

LESLIE E. DEVANEY
ANITA M. NOONE
LESLIE J. GIRARD
SUSAN M. HEATH
GAEL B. STRACK
ASSISTANT CITY ATTORNEYS

LISA D. O'NEAL
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Casey Gwinn
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1200
SAN DIEGO, CALIFORNIA 92101-4184
TELEPHONE (619) 533-5800
FAX (619) 533-5847

MEMORANDUM OF LAW

DATE: April 22, 1997

NAME: Penelope Culbreth-Graft, DPA, Assistant City Manager

FROM: City Attorney

SUBJECT: Liability Issues Associated with Providing Free Sandbags to Residents to Protect Against Flooding Conditions

QUESTIONS PRESENTED

1. Is the City exposed to civil liability if it provides free sandbags to residents during potential flooding conditions?
2. Would the City be legally obligated to provide assistance for other types of emergency situations if it began to provide free sandbags to potential flooding victims in the City?

SHORT ANSWERS

1. Possibly. The lack of sufficient details, about how the free sandbag program would operate, makes it impossible to fully analyze the liability exposure.
2. No. The City would not be legally obligated to provide other emergency materials merely because it provided free sandbags to potential flooding victims.

BACKGROUND

In the past, the City of San Diego has not been involved in the distribution of free sandbags to residents during times of flooding in the low-lying areas of the City. In particular, sections of Pacific Beach, Mission Beach, and Ocean Beach are prone to flooding from high surf during winter storms and tidal surges. The City maintains a supply of sandbags to help protect City property during a flooding emergency. However, it does not maintain an adequate supply to provide residents with sandbags as well. Residents are generally given advance warning of these flooding conditions by the City of San Diego's Office of Disaster Preparedness and Fire and Life Safety Services, and directed to local retail outlets to pick up or purchase appropriate materials in order to properly protect their homes and property. These businesses routinely offer free sandbags, or sell them at cost. During the floods of 1991 and 1993, Home Depot provided the public free sandbags when flooding conditions were clear and present. Home Depot agents recently assured Emergency Management staff they will continue this practice.

Councilmember Wear has requested that the City consider purchasing a sufficient number of bags and developing an appropriate distribution policy to provide them to coastal residents as a precautionary measure when flooding is imminent due to high surf.

ANALYSIS

I. LIABILITY ISSUES

A. The City Generally Has No Duty to Supply Flood Protection Control From Natural Causes

Under the California Tort Claims Act, a public entity is not liable for an injury arising out of an act or omission of the public entity or public employee or any other person, except as otherwise provided by statute (i.e., a California statute or the federal or state constitution.) Cal. Gov. Code § 815. The City of San Diego, like other public entities, generally has no legal duty to supply any level of flood protection control to lands historically subject to flooding from natural causes, provided the City has not assumed this duty by substantially participating in the planning, approval, construction, operation, or maintenance of a flood control public project or improvement that effects the natural water flow. See Locklin v. City of Lafayette, 7 Cal. 4th 327, 366 (1994); Wildensten v. East Bay Regional Park District, 231 Cal. App. 3d 976, 980 (1991); Tri-Chem, Inc. v. Los Angeles County Flood Control District, 60 Cal. App. 3d 306, 312 (1976). Thus, the City is not generally liable for natural flooding damages to historic flood plains resulting from a failure to provide sandbags or other flood protection control.

B. Liability May Be Assumed if the City Leads Citizens to Rely on the City's Flood Protection Efforts Creating a "Special Relationship" Duty

A court would probably not find that the City assumed liability by merely providing free sandbags to residents for them to stack and build their own flood barriers. Simply giving residents sandbags would not constitute a public improvement or work which would expose the City to possible tort or inverse condemnation liability. See Locklin, 7 Cal. 4th at 338; Wildensten, 231 Cal. App. 3d at 980. The City, however, when implementing and operating a free sandbag program must be careful not to make any promises or take any special actions with residents that would create the impression that the City has assumed responsibility to supply all their sandbag needs during any possible flood conditions. The creation of such a "special relationship" may lead to a legal duty to reasonably aid and protect these residents during natural flooding conditions. Cal. Gov. Code § 815.6. The City could then be held liable if residents detrimentally rely on the City to provide sandbags and the City is unable or unwilling to do so.

C. Other Liability Exposure May Exist Depending on How the Sandbag Program is Going to Be Implemented and Operated

The proposal, for example, does not indicate how the City plans to distribute the bags, whether sand will be provided, and if so, who will fill the bags with sand. The liability exposure cannot be completely analyzed until these details of the proposed program are resolved.

D. Providing Free Sandbags to Residents Facing Potential Flooding Would Not Impose an Ongoing Legal Duty on the City to Provide Other Types of Emergency Materials

Providing free sandbags during some particular flood conditions would not give rise to a continuing legal duty for the City to provide such aid in the future. See City of Santee v. County of San Diego, 211 Cal. App. 3d 1006, 1016 (1989). Nor would it impose a legal duty to provide other types of emergency materials provided the City, in the implementation and operation of the sandbag program, does not lead residents to believe the City is assuming such an obligation and "special relationship."

II. OTHER CITIES' EXPERIENCES WITH PROVIDING SANDBAGS TO RESIDENTS DURING FLOODING CONDITIONS

The City Attorney's Office contacted seven cities throughout the country who have recently and historically experienced significant flooding conditions.¹ Five of the seven cities have some type of sandbag program. Only one of these cities suffered a related lawsuit which stemmed from city workers' negligent placement of sandbags along a creek. Another city faced potential negligence liability, although no claims were filed, when residents in imminent flooding danger almost failed to receive city provided sandbags in time to protect themselves due to the city's provision of sandbags to other demanding residents whose flooding danger was not as threatening. Overall, all five cities were very supportive of the sandbag programs.

CONCLUSION

It is very unlikely that a court would find the City liable for damages caused by natural flooding to land historically subject to flooding merely because the City provided free sandbags to residents for the residents to construct their own flood barriers. Providing sandbags to residents would not likely constitute a voluntary assumption of a public protection service duty as to expose the City to either tort or inverse condemnation liability for natural flooding damages. However, there are insufficient details about how the program would be implemented and operated to provide a complete liability analysis. Finally, providing free sandbags to potential flooding victims would not subject the City to an ongoing duty to provide the same or similar service unless the City expressly or implicitly promises to assume such ongoing obligations.

CASEY GWINN, City Attorney

By

LISA D. O'NEAL,
Deputy City Attorney

LDO:ldo:040.1 (043.2)
ML-97-14

¹We contacted the following seven cities: Pittsburgh, Pennsylvania; Louisville, Kentucky; Falmouth, Kentucky; Cedar Rapids, Iowa; Sacramento, California; St. Louis, Missouri; and Cincinnati, Ohio.